IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

No. 109.

FEDERAL POWER COMMISSION et al.

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, et al.

No. 188.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, et al.

No. 209.

MEMPHIS LIGHT, GAS AND WATER DIVISION

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, et al.

No. 212.

ILLINOIS COMMERCE COMMISSION

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RESPONSE OF MEMPHIS NATURAL GAS COMPANY.

EDWARD P. RUSSELL,
Twenty-Ninth Floor, Sterick Building,
Memphis, Tennessee,
Attorney for Memphis Natural Gas Company.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

Cases Cited.

Statutes Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

No. 109.

FEDERAL POWER COMMISSION et al.

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, et al.

No. 188.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, et al.

No. 209.

MEMPHIS LIGHT, GAS AND WATER DIVISION

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, et al.

No. 212.

ILLINOIS COMMERCE COMMISSION

v.

INTERSTATE NATURAL GAS COMPANY, INCORPORATED, et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RESPONSE OF MEMPHIS NATURAL GAS COMPANY.

STATEMENT.

The events and orders leading to this controversy are accurately stated in the petitions. For brevity's sake they will not be repeated, but are adopted by reference.

The effort of the petitioners in this proceeding for an order directing payment to distributing companies which are customers of the pipe line companies and, in turn, directing the distributing companies to divide the money among ultimate consumers is fundamentally a request that this court undertake judicial legislation. There is no statutory or case law authority to warrant such a request. The petitioners hope to make new case law and to enlarge not only the scope of the Natural Gas Act, but also the scope of the appellate jurisdiction conferred by the Natural Gas Act upon the Circuit Courts of Appeals.

The petitioners request that the court depart from the Act of Congress by assuming greater jurisdiction than conferred. But the extraordinary request is beyond judicial precedent.

Memphis Natural intervened January 26, 1948 (R. 42), and claims $592,465.82 (R. 110).

As stated in the Memphis Natural intervention petition, it owns and operates a pipe line which originates in Louisiana, passes through Arkansas and Mississippi, and terminates in Tennessee. The gas is transported and sold at wholesale to distributing companies and one industrial customer. Its customers are:

Louisiana Power & Light Company, a distributing company;

Arkansas Power & Light Company, a distributing company;

Mississippi Power & Light Company, a distributing company;

West Tennessee Gas Company, a distributting company;

Light, Gas & Water Division of the City of Memphis, a municipal agency for the distribution of gas, etc.;

Memphis Generating Company, a private corporation, which purchases gas direct for industrial use.

The sales to distributing companies are subject to the Commission's jurisdiction, and direct sales to industrial customers are not subject to its jurisdiction. Panhandle Eastern P. L. Co. v. Federal Power Commission, 324 U. S. 635.

The Light, Gas and Water Division of the City of Memphis is our only customer which has filed a certiorari petition. Its petition plainly shows that it has no intention of distributing to ultimate consumers such part of the fund, if any, as it may receive. The idea that ultimate consumers will be benefited if the court gives the relief sought by the petitioners is impractical and fantastic. Our only complaining distributing customer, as shown by its petition, has no intention of dividing the money among the ultimate consumers during the years involved. It intends to pocket the money and call it quits. If, however, Memphis Natural is directed to deliver the money to the distributing companies, there is no way in this proceeding to require the distributing companies to pass along the money to their ultimate consumers during the several past years. The distributing companies are neither parties to this proceeding nor subject to the jurisdiction of the Commission. It therefore is futile to talk in this proceeding about something to be done for ultimate consumers.

The sole question is the identity of the parties from whom the funds were withheld during the stay order. Admittedly the pipe line customers of Interstate would have received the fund but for the stay order. It is difficult to understand how a stay order can change the title to the fund, as contended by petitioners.

This is an attempt to turn the courts into rate-making bodies and thus relieve the Commission of work imposed

by the Act upon the Commission. It is an attempt to make the courts do work far beyond the Congressional intent expressed in the Natural Gas Act. The end result of the petitioners' request is that current rate schedules fixed by the Commission be ignored and the fund distributed in such fashion that the current rate schedules be by-passed. We refer to the rate schedule fixed by the Commission for Interstate and its customers and the rate schedules fixed by the Commission for Interstate's pipe line customers and their distributing company customers. The petitioners' plan in this proceeding is to by-pass all of these rate schedules and in effect cause all of the pipe line companies to violate the schedules by charging more or receiving less than ordered by the Commission. This is the inevitable result of the relief sought by the petitioners. If there is or was anything wrong with these various rate schedules so promulgated by the Commission for the years in question, the Commission had, under the Natural Gas Act, an adequate remedy to correct them. If it has failed to do so, the courts cannot, under the guise of a distribution order, perform the administrative duties of the Commission and become retroactive rate-making bodies. An orderly approach and examination of the Natural Gas Act seems to warrant these statements.

LIMIT OF THE COMMISSION'S DUTIES AND JURISDICTION.

The Commission's petition should be denied as the Act does not give it authority to participate in a contest over the impounded funds. Its duties were performed and its jurisdiction exhausted when the rate reduction order against Interstate became final on October 13, 1947. Interstate Natural Gas Co. v. Federal Power Commission, 332 U. S. 785.

The Natural Gas Act, Section 5 (a), 15 U. S. C. A. 717d,

> "authorizes the Commission after hearing to determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and * * * fix the same by order."

LIMIT OF COURT OF APPEALS' DUTIES AND JURISDICTION.

The Natural Gas Act, Section 19, 15 U. S. C. A. 717r (b), states:

> "Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part."

The Commission ordered the Interstate rate reduction, the Court of Appeals affirmed and this court later affirmed.

The Act then states in Paragraph 717r (c) that an appeal to the Court of Appeals "shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

The Act does not state the manner in which the impounded funds shall be distributed, but leaves the question to the Court of Appeals. The Act does not authorize the Commission or these other petitioners not in privity with Interstate to participate with reference to the distribution of the fund. If this is a correct statement, the petitions should be dismissed as the Act does not authorize the things proposed to be done by the petitioners. The petitioners do not cite any authority in the Natural Gas Act to warrant their intervention. The Act is the limit of the petitioners' rights. It does not confer upon petitioners the rights assumed by them. The petitioners do not profess any such statutory right.

ERRONEOUS ASSUMPTION BY PETITIONERS.

Petitioners have assumed that Interstate's pipe line customers during the years in question earned their allowable returns. Illinois Petition, p. 17. Commission's Petition, p. 14. By implication the petitions admit that the relief sought by them, i. e., an order delivering the fund to ultimate consumers, cannot be expected if the pipe line companies did not earn the allowable returns during the years in question. Memphis Natural did not earn during the years in question its allowable return. The retention by Memphis Natural of the Interstate reduction will result in Memphis Natural earning in 1944 .38 of 1% and in 1945 .33 of 1% in excess of the allowable return and in 1946 .86 of 1% less than the allowable return. The average for the three years is less than the allowable return even if Memphis Natural gets its proper part of the impounded fund. These figures are a matter of record in the Commission's office. The plain fact is that the Memphis Natural rate schedules ordered by the Commission on July 26, 1943, Commission's Petition, p. 15, were wholly inadequate to provide its prescribed allowable return. As stated, Memphis Natural will not exceed the allowable return if it receives its part of the Interstate refund. Aside from any law involved, Memphis Natural is entitled to its part of the money in order to bring it up to the allowable return. It is just as much the duty of the Commission to see that a pipe line company gets a fair return as to protect the public against excessive rates. All of these rate questions will have to be examined in this proceeding if equity is to be done to all parties because it will be highly inequitable to do as proposed by the petitioners, i. e., enter an order of distribution to distributing companies, and, in turn, order them to distribute to ultimate consumers upon the assumption

that the pipe line companies have earned during the years in question a fair or allowable return without inclusion of the Interstate refund. This is not true of Memphis Natural as reflected by the Commission's records. If there had been any doubt about these matters, the Commission could have, at any time during the past years, ordered Memphis Natural or any one of the pipe line companies to show cause why it should not reduce its rates to reflect the Interstate rate reduction. Apparently the Commission thought there was no occasion for such a show cause order.

THE COURTS ARE NOT RATE MAKING BODIES.

Newton v. Consolidated Gas Co., 258 U. S. 165:

> "Rate making is no function of the courts and should not be attempted, either directly or indirectly."

Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 183: Speaking of rates, this court said:

> "So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts."

The Natural Gas Act does not give to the courts original rate making jurisdiction, but limits the jurisdiction to a review of the rate orders by the Commission.

Mississippi Power & Light Co. v. Memphis Natural Gas Company, 162 F. (2) 388 (5 C.):

> "Rate making is a legislative function that the courts will not interfere with, at least until the Commission has exercised the function."

Colorado Gas Co. v. Federal Power Commission, 324 U. S. 581;

L. & N. Railroad Co. v. Maxwell, 237 U. S. 94.

Bull S. S. Lines v. Thompson, 123 F. (2) 943 (5 C.):

> "Courts may not strike down the plain and unambiguous terms of tariffs set up and approved by the Interstate Commerce Commission."

If the relief sought by the petitioners is granted, the result will be confusion and a total departure from rate schedules promulgated by the Commission and in effect for the last several years.

If the court delivers the impounded funds to distributing companies, such an order will be tantamount to the creation of a new rate schedule for Interstate and its customers. This necessarily follows, as Interstate has collected for the years in question higher rates from its customers than ordered by the Commission. Unless the overcharges are returned to its customers, a price different from that ordered by the Commission will be collected by Interstate from its customers. Such a result will be a plain violation of the Act and an invasion of the lawful authority of the Commission. The courts have no such original rate-making jurisdiction.

If the pipe line customers of Interstate are by-passed and the funds delivered to distributing companies which are customers of Memphis Natural, there is an additional reason for this being an invasion of the original rate-making jurisdiction of the Commission. The Commission has fixed the rates to be paid by such distributing companies to Memphis Natural. Receipt by the distributing companies of the impounded funds will confer upon them for the years in question a lower rate than fixed by the Commission in the Memphis Natural rate schedules.

The courts have no jurisdiction to enter any kind of order which will affect, directly or indirectly, the contract price to be paid Memphis Natural by a direct industrial

customer, as said sales are excluded by express language of the Act from Federal regulation.

Neither the Federal courts nor the Commission have jurisdiction to direct a distributing company to pass along to ultimate consumers any part of the funds, as intrastate sales are subject solely to the jurisdiction of the local regulatory bodies.

If the court by-passes the pipe line customers of Interstate, such act will constitute rate-making; as all of the rate schedules on file with the Commission and applicable to Interstate, applicable to its pipe line customers, and applicable to the customers of the pipe line companies will be violated. Such act will in substance be a reparation order. Admittedly, not even the Commission has power to enter such an order. It has no power to make a retroactive rate order, as this is expressly forbidden by the language of the Act. It therefore follows that the Commission cannot by circumvention and indirection accomplish by an intervention petition in this proceeding some objective prohibited by the Act.

THE IMPOUNDING ORDER.

The stay order by the Court of Appeals on June 14, 1943, is relied upon by petitioners to bolster their claims. Because the order mentioned "ultimate consumers" (R. 2), it is argued that the stay order was, in effect, a recognition or adjudication that they are the owners of the fund. But no such interpretation is warranted as the order plainly expresses the intent to reserve judgment as to the parties to receive the fund. It states that money will be "returned to such ultimate consumers of gas, or other parties to whom the court shall find the same shall be returned," etc.

The pipe line customers of Interstate were not parties to the proceeding at that time and are not bound by the

language. It is obvious, however, that the court intended to completely reserve judgment as to the distribution of the fund and did not intend to suggest at that time the parties ultimately entitled to the fund.

The Court of Appeals has now found that the pipe line companies are "the other persons to whom" the money shall be returned. We respectfully submit that the petitions should be denied, otherwise the courts will be in the role of rate-making bodies with all of the attendant burdens incident to such duties.

Respectfully submitted,

EDWARD P. RUSSELL,
Twenty-Ninth Floor, Sterick Building,
Memphis, Tennessee,
Attorney for Memphis Natural Gas Company.